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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 359

ALLEGHANY CORPORATION, *et al.*,
Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS ALLEGHANY CORPORATION, ET AL., AND FOR PETITIONERS ROSE SLAYTON, ET AL.

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I.

Reply to arguments that recognition of petitioners' claim of a right to a separate vote will frustrate Federal transportation policy and that petitioners should look to the Interstate Commerce Commission for relief

Throughout both briefs, petitioners' claim to recognition of the protective provisions of the MoPac charter is referred to as a claim to "an absolute power of veto," "an absolute veto," a "veto," a "permanent veto power,"

etc. which, if recognized, will thwart federal policy to facilitate merger and consolidation in the national transportation system. Petitioners are put in the category of "troublesome minorities" and they are said to be a "tiny class" (MoPac Br. 47, 71, 91, 94) with a "minuscule interest" (Miss. Br. 30).

The number of the Class B votes is correctly described as "tiny." Their total vote of 39,731 shares is indeed at the mercy of the 1,849,576 Class A shares.

Put in another way, however, petitioners' interest is far from "tiny" or "minuscule." On September 30, 1963, the equity interest of the B shares stood at $209,763,642 as against the limited interest of the A shares of $184,957,600 (R. 31, 97).

Petitioners are the ones most directly affected by the proposed plan. It should hardly be surprising that an interest so great and so deeply affected should now turn to the protective provisions of the charter that were included at the instance of the Interstate Commerce Commission in an attempt to protect this "tiny" numerical interest against virtual expropriation by the dominant A group. Nor is there anything in petitioners' legal claim that contravenes federal transportation policy.

There are two federal policies that are relevant.

One is the policy found in the 1940 revision of §5, and particularly of §5(2)(a), of the Interstate Commerce Act, to "facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States*, 356 U. S. 412, 416-17 (1958).

The other is found in the same revision of 1940 in §5(11) in which recognition is given to State law as to the stockholder vote required to accomplish any consolidation. The vote required under State law, be it a

simple majority vote, a two-thirds vote, a three-fourths vote, a four-fifths vote, a class vote, two-thirds of each class, four-fifths of each class, and various combinations of votes, etc.* may defeat any plan of consolidation no matter whether the plan might be deemed by the Commission to be in the public interest and just and reasonable. In fact, as here, the stockholder vote may be taken before hearings on the plan before the Commission (R. 30, par. 17(b)). There is thus in federal law a Congressional decision to defer to the vote of stockholders on the ultimate question as to whether the plan or any plan may go forward at all. This is a policy to require the approval of stockholders under whatever provision State law has made for securing such approval. To use respondents' words, Congress has created "an absolute veto" in the vote of the stockholders. Under this Congressional policy, the stockholders have a decisive voice, yea or nay, on the plan, whatever may be its fairness and reasonableness.

In this proceeding petitioners ask that this explicit Congressional policy for the protection of stockholder rights be recognized and given effect. That policy stands with equal strength and dignity as the policy first mentioned. It is no "narrowly-drawn exception" (MoPac Br. 29) to be "narrowly construed" (MoPac Br. 32) and to be given only a "minimal" role (MoPac Br. 13). Both policies are parts of the national transportation policy of this country. The one is as much an integral requirement of the statute as is the other.

MoPac further argues that a minority group such as petitioners represent is adequately protected before the

* The different votes stated here are not hypothetical. They are taken from the variety of State statutory provisions as to voting requirements on railroad consolidations stated *infra*, pp. 5-6.

Commission at hearings on the fairness of the plan (MoPac Br. 22-23, 47, 81) and that, consequently, there is no need to recognize the claim to a separate vote. The argument is that §5(11) must defer to the grand design of federal law to facilitate consolidations and that this design includes hearing and relief for minority groups which, consequently, need not look to their right to vote under §5(11). The argument flies in the face of the language of §5(11). Whatever discretion, duty or expertise the Commission may have in its consideration of a plan is no substitute for the Class B stockholders' legal right, which we claim, to vote separately as our interests as stockholders may dictate (see our main brief, pp. 25-26).

What is more, the Commission itself, in MoPac's reorganization, required the inclusion of the class voting provision in MoPac's charter (290 I.C.C. 477, 665). The provision was designed for the protection of the Class B shareholders. It would be ironic to deprive them of this protection on the plea that the ICC—which deemed class voting essential—can protect the Class B as well without a class vote.

II.

Reply to arguments as to the construction of Section 5(11) of the Interstate Commerce Act

In keeping with their claim that the voting clause of §5(11) is to be treated as a narrowly drawn exception to a grand federal design to facilitate railroad consolidation, respondents seek a narrow construction of §5(11) in two respects:

1. Both briefs argue that in §5(11) federal law defers only to state statutory law and not to charter provisions made effective by a state statute, as here (MoPac Br. 66-87; Miss. Br. 98-100). There is nothing in the language of §5(11) that draws this restrictive distinction. The statutory words are "unless a different vote is required under applicable State law". In thus deferring to the "applicable State law," §5(11) surely means all of the applicable State law, not just part of it. It refers not just to §351.425 of the Missouri Statutes, which requires a two-thirds overall vote, but it equally refers to §351.270, which requires, in addition, the vote prescribed by the charter. It is the Missouri statute, §351.270, that "makes the charter percentage the statutory one," *Sellers* v. *Joseph Bancroft & Sons Co.*, 23 Del. Ch. 13, 2 A. 2d 108, 113 (Del. Ch. 1938).

MoPac next urges that State statutory provisions might be expected not to be "unduly burdensome" whereas charter provisions made effective by a State statute might impose "increased obstacles" to the federal design that are "immeasurable" (MoPac Br. 77-80). Actually, the variety of State statutory provisions as to voting requirements affecting railroad consolidations, includes almost every conceivable requirement: simple aggregate voting (*e.g.*, Wis. R.R. Law §190.06); an overall two-thirds majority (*e.g.*, Kans. P.U. Law §66-506; Kans. Corp. L. §17-3703); an overall three-quarters majority (*e.g.*, Wash. Transp. L. §81.36.070); an overall four-fifths majority (*e.g.*, Tex. B.C.A. §5.03); a two-thirds majority of each class (*e.g.*, Mich. G.C.A. §450.52); a combination of a simple majority of each class as well as a simple majority of the overall vote (*e.g.*, Utah B.C.A. §§16-10-68, 16-10-56); a combination of a two-thirds majority of each class as well as

a two-thirds majority overall vote (*e.g.*, N.Y.B.C.L. §§903,804); and a combination four-fifths majority of each class as well as a four-fifths majority overall vote (*e.g.*, Tex. B.C.A. §§5.03, 4.03).

All these provisions are "applicable" under §5(11); and we find not the slightest hint in §5(11) that it is meant to exclude State statutes which require the vote prescribed by charter. Certainly the voting requirements of MoPac's charter (a simple majority of each class in addition to the overall two-thirds vote) are moderate, keep within customary limits, and have been expressly approved by the Commission and by the courts approving and confirming MoPac's reorganization plan.

We are further told that the purposes of §351.270, the Missouri statute that gives effect to charter provisions and upon which we rely, are "completely antithetical" to the federal design and that if we have any complaint we are referred to the Interstate Commerce Commission (MoPac Br. 80-82).

Our first point in reply is that this argument disregards the fact that the MoPac charter and the protective provision upon which petitioners rely were not, as respondents state, either "antique and outmoded" or included by "the private parties" (MoPac Br. 82, 69), but were, on the contrary, included in the charter at the instance of the Commission as an essential part of the plan of reorganization of MoPac in 1954 (see our Main Br. 6-8). These protective provisions are part of the Commission's design for MoPac and as such they also reflect express federal policy here. It is these protective provisions that have been disregarded and that petitioners now ask be given effect under Missouri statutory law, §351.270.

Our second point in reply is that in the final analysis the vote of stockholders required on the particular consolidation here involved is the vote called for in the charter and these charter provisions are recognized and given effect by the applicable Missouri statute, §§351.055 and 351.270. This is the "law" of Missouri. "Law" in this instance is a combination of charter provisions and statute. The protective charter provision inserted at the instance of the Commission becomes "law" because of the provisions of §351.055 and §351.270 of the Missouri statutes. Missouri has legislated and has declared in §351.270 that if charter provisions are more stringest they "shall control." That declaration could scarcely be more emphatic. It is surely "law."

The effort of respondents to draw a line between charter and statute disregards the substance of the term "law." It injects, in the name of a federal purpose, a wholly artificial meaning that, if applied here, would frustrate not only the purposes and policies of the federal Commission in insisting upon protection for the new Class B shares but also the Congressional purpose in §5(11) to give effect to the required stockholder vote under State law as one of the three essential considerations to a voluntary consolidation under the federal Interstate Commerce Act, *Schwabacher* v. *United States,* 334 U. S. 182, 194 (1948).

Finally, we are told that minorities, such as we, will be protected by the Commission (MoPac Br. 81). We submit that when the Commission in 1954 insisted upon inclusion of the protective clause in the charter, it doubtless thought it was protecting us. We ask that this evident purpose be carried out. It was an essential element in bringing about the reorganization. Respondents now seek a result that would frustrate this purpose by

erasing the protective clause from the charter. And we reiterate the argument in our main brief, pp. 25-26, that whatever right we have to appeal for relief to the Commission furnishes no ground for rejecting our present claim at law.

2. Both briefs argue that §5(11) defers to State law only insofar as the "number" of votes required is greater than a majority with the consequence that a requirement of a class vote, even if explicitly imposed by a State statute, is not recognized at all by §5(11) (MoPac Br. 88-94; Miss. Br. 100-101). The significant phrase upon which the deference to State law is conditioned, however, is "unless a different vote is required" under State law. The "number" of shares that "shall assent" is thus dependent upon a "different vote"—an all-inclusive term. This effort of respondents to direct attention solely to the word "number" produces a restrictive interpretation of §5(11) that necessarily draws a sharp line down the middle of the all-inclusive phrase "a different vote." Respondents' contention would mean that Congress drew a line between class votes and aggregate votes so that, even when a class vote is explicitly required by statute, or, as here, by a charter provision made effective by statute, the result would be the same. The class vote would stand apart and would have no significance at all under §5(11) with the further result that the majority vote, otherwise provided in §5(11), would be operative in total disregard of State law. Such a result warns against acceptance of such a strained reading of the all-inclusive phrase "a different vote."

There is nothing in the language of §5(11) to suggest that Congress was expressing a purpose to draw such a

distinction. The evident purpose, we submit, was to give effect to "applicable State law," whatever it might be. The language refers to "a different vote" that may be required under applicable State law in which case "the number so required . . . shall assent." The important words are "a different vote." The word "number" relates to that different vote.

Respondents' reliance on the use of the singular "number" instead of the plural "numbers" overlooks the statutory rule that "In determining the meaning of any Act of Congress, unless the context indicates otherwise, words importing the singular include and apply to several persons, parties, or things;" 62 Stat. 859, §6 (1948), 1 U.S.C.A. §1 (Supp. 1966), as amended.* If the word "number" in §5(11) is thus read as "numbers", it plainly includes State statutes requiring and recognizing class votes.

The broad policy of §5(11) should be given full effect and not stultified by a reading not warranted by the language used and certainly not called for by any legislative history.

The conclusive answer to respondents' conception of §5(11) is found in the consistent construction of that section by the Interstate Commerce Commission, the agency primarily responsible for its enforcement. In our main brief, pp. 23-24, we pointed out cases in which the Commission had consistently construed §5(11) to comprehend a class-vote requirement.**

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* Prior to the 1948 amendment, the statute merely provided that "words importing the singular number *may* extend and be applied to several persons or things," 61 Stat. 633 §1 (1947).

** As we noted in an erratum sheet which we filed prior to respondents' brief, one case (*Chicago & N.W. Ry.*, 328 I.C.C. 126) was irrelevant to that proposition. See MoPac Br. 87 n. 13.

We emphasize specifically the following in support of our position:

> *Missouri Pac. Control of Chi. & E. Ill. R.R.*, I.C.C. F.D. No. 21755, report of hearing examiner dated Sept. 26, 1961, pp. 128-29, where the ICC hearing examiner specifically found that the Chi. & E. Ill. Class A stock held by MoPac was entitled to a class vote on mergers and consolidations by virtue of Chi. & E. Ill.'s charter, but went on to hold that this limited "veto" power by MoPac over Chi. & E. Ill. mergers did not amount to "control" of the latter.*
>
> *Norfolk & W. Ry. Merger*, 307 I.C.C. 401, 415 (Div. 4, 1959), where Division 4 expressly found that "under Virginia law, which is controlling on this point, approval of the plan of merger requires the affirmative vote of the holders of more than two-thirds of the outstanding capital stock of each company, including at least a majority of each class of stock of each company."
>
> *Southwestern R.R. Control*, 282 I.C.C. 359, 362-63 (Div. 4, F.D. No. 17217, 1952), where the full Commission treated a State law requirement of unanimous consent as controlling for a proposed sale of assets under §5(2).**

This Court has emphasized the respect owing to the Commission's interpretations of the statute it is charged with administering. *E.g.*, *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549 (1940); *Maintenance Employes* v. *United States*, 366 U. S. 169, 179 (1961).

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* This involves the same matter in which this Court recently affirmed the judgment of the District Court *sub nom. Illinois Central R. Co.* v. *United States, et al.*, Oct. Term 1966, Nos. 687, 688, 689, decided January 9, 1967.

** This situation came about when minority shareholders of the railroad brought an injunction suit in the Georgia State Court to

III.

Reply to arguments that MoPac's charter does not provide for a class vote on the proposed consolidation

Paragraph (3) of Article VII (D) of MoPac's amended Articles of Association states without any qualification or limitation:

> "The Company shall not, without the consent . . . of the holders of record of at least a majority of the number of shares of the Class A stock then outstanding and at least a majority of the number of shares of the Class B stock then outstanding . . . (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock or of the Class B stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (R. 13)

This is the protective provision which, as we pointed out above and in our Main Br. 7-8, was included at the direction of the Interstate Commerce Commission when it approved MoPac's final plan of reorganization, the Commission having observed that under the plan the Class A stockholders would have voting control of the Company (290 I.C.C. 477, 597-98, 665).

There can be no serious question that carrying out the presently proposed plan of consolidation will "alter or change the preferences . . . limitations . . . and special

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enjoin the railroad from accepting a plan of reorganization on the ground that under the laws of Georgia unanimous stockholder consent was necessary to authorize the sale of the railroad properties. The decision of the lower court granting an injunction was affirmed on appeal to the Supreme Court of Georgia and this Court denied a petition for a writ of certiorari on October 9, 1950, 282 I.C.C. at 362-63.

or relative rights" heretofore held by MoPac's Class A and Class B stockholders, and will entail company action by MoPac (R. 97) (our Main Br. 9-10).

The prohibition in paragraph (3) of Article VII (D) of MoPac's amended Articles of Association, quoted above, is absolute. MoPac seeks to meet this flat prohibition with three arguments:

1. MoPac argues (MoPac Br. 39-40) that the omission in paragraph (3) of Article VII (D) to recite that the prohibition includes a change or alteration by a merger or consolidation was "a conscious choice" which is "conclusive in itself" (MoPac Br. 40) and shows that any change or alteration by means of a merger or consolidation was intended to be excluded from the prohibition. As the District Court concluded (R. 93), and as we point out in our Main Br. 32, the language is all-inclusive and focuses on the result, not the method by which the change or alteration is accomplished.

In addition, MoPac's amended Articles make it apparent that when the draftsmen intended that mergers or consolidations should be excluded from the operation of the Articles they specifically so stated. This is demonstrated in the preceding paragraph (2) of Article VII (D), which provides for a preferential payment of $100 plus unpaid dividends on each share of MoPac Class A stock in the event of liquidation, dissolution or winding up of the company (R. 12-13). The paragraph goes on to state, however, that a merger or consolidation involving MoPac shall not be "deemed to be a liquidation, dissolution or winding up of the Company" (R. 13). The reason for excepting mergers or consolidations from the operation of this paragraph seems apparent. Nevertheless, the draftsmen of the Articles did not leave this

exception to be found by inference. When they intended that mergers and consolidations were, in a given case, to be excluded from the application of MoPac's amended Articles, its draftsmen were careful to state so specifically.

Moreover, while VII(D)(3)(c) nowhere mentions consolidations, neither does it mention charter amendments, or any kind of action whatsoever. By its terms it is clearly all-inclusive or else it has no meaning at all. Even respondents would not go so far as to contend that it means nothing, and MoPac suggests that it should apply only to charter amendments (MoPac Br. 42 et seq.) But why to charter amendments, when they are also nowhere specified, respondents never explain.

2. MoPac next urges (MoPac Br. 42) that it would be "inequitable" if the "de minimis" 2.1% voting power of its Class B stock were to be "enlarged by implication to include a class vote on the all-important question of mergers and consolidations." In weighing this appeal to equity it seems appropriate to take into consideration that under MoPac's finally approved plan of reorganization its Class B stock became "entitled . . . to all residual earnings after payment of dividends on the Class A stock . . ." (290 I.C.C. 477, 600), and that the "Class B stock was to become the residuary beneficiary of any future prosperity the property may enjoy" (290 I.C.C. at 625) and that this stock is now the major equity owner of MoPac. The Class B stockholders' voting power may be "de minimis" but their financial stake in the enterprise is over $209,000,000 and exceeds that of the Class A shares (our Main Br. 10).*

* Nowhere does MoPac attempt to explain why the ICC and the reorganization court should ever have intended that the Class A (the former preferred) should be allowed to gorge itself on MoPac's equity. As respondents' own extensive references to the reorgani-

3. MoPac next argues* (MoPac Br. 44) that the proposed consolidation entails no change in the relative rights or preferences of MoPac's Class A or Class B stock within the meaning of VII(D)(3)(c) of the charter because they will cease to have any relative rights or preferences after the consolidation which will result in the disappearance of both classes. The stockholders, however, will not disappear. The consolidation will first obliterate their present rights in the enterprise and then give these same stockholders entirely different rights in the same enterprise. We would regard obliteration as the ultimate in change or alteration.

MoPac, however, seeks to make this obliteration more palatable by pointing out that the proposed consolidation will result in MoPac's Class A and Class B stockholders receiving securities in a new company in accordance with a plan which must be found "just and reasonable by the Commission" (MoPac Br. 44) and that, therefore, it is

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zation history show (MoPac Br. 40-41 n.1; Miss. Br. 27-28), for the first 16 years of MoPac's reorganization history, neither class was accorded any recognition by the ICC, and even on the third reorganization plan the Class A was accorded only a bare $30 million on accumulated claims of $163 million. Re Missouri Pac., 93 F. Supp. 832, 850-51 (E.D. Mo. 1950). Although Mississippi contends that the ICC had to create an additional $250 million in capitalization on the fourth reorganization plan in order to recognize the Class B (Miss. Br. 30), it fails to mention that practically all of the Class A's present equity also came about solely from that same additional capitalization approved by the ICC.

The Class A's rights derive from the same source as the Class B's. When it appeared that the ICC had been underestimating MoPac's earning power, the Fourth Reorganization Plan was created, in which sufficient equity was found to fully compensate the former preferred and recognize the former common. The projection of earning power has been amply borne out.

* We disregard the claim (MoPac Br. 43-44) that subparagraph (a) of Article VII, Section D(3) has no application here. This case does not concern it.

unnecessary "to go through the involved process of reading a class vote into the Articles with respect to a merger or consolidation in order to protect the Class B stockholders . . ." (MoPac Br. 47). This flies in the face of the federal policy so clearly enunciated in §5(11) of the Interstate Commerce Act that irrespective of how just and reasonable a plan of consolidation approved or fashioned by the Commission may be, the stockholders concerned shall have the ultimate say as to its acceptance or rejection. (See pp. 2-3 *supra*.) Respondents' proclivity to minimize the importance of stockholders' voting rights under §5(11) in carrier mergers or consolidations by comforting themselves with the proposition that the terms of such transactions must be found "just and reasonable" by the Commission would, if followed to its logical end, do away completely with any meaning or need for ultimate stockholder control over the acceptance or rejection of such plans prescribed by §5(11).

IV.

Chapter 351, not Chapter 388, of the Missouri Statutes is the "applicable State law" determining the requisite stockholders' vote pursuant to Section 5(11) of the Interstate Commerce Act

Respondents contend that Chapter 388 of the Missouri Statutes is the "applicable State law." Alternatively, if Chapter 388 be inapplicable, respondents dispute that Chapter 351 can be applied; in that case, they say, there is no "applicable State law" and the simple majority vote of §5(11) of the Commerce Act controls. We disagree with both contentions.

A. Reply to Arguments that Chapter 388 is "applicable State law"

1. We urge that this Court follow the concurrent holdings of both courts below that Chapter 351 is the "applicable State law."

Both courts below held that Chapter 351 applies to the proposed consolidation and the Court of Appeals, though finding other points of Missouri law to be doubtful, found no doubt on this point and specifically held that Chapter 388 does not apply (R. 150-53, 157).

In the absence of a contrary State court decision, it is the practice of this Court to accept a determination of State law concurrently reached by both courts below, *MacGregor* v. *State Mut. Life Assur. Co.*, 315 U. S. 280 (1942), unless it is "clearly erroneous or unreasonable", *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 527 (1960).

2. Respondents Themselves Have Recognized that Chapter 351 Rather than Chapter 388 Controls.

MoPac has announced publicly, and has also stated in its application to the ICC, that the plan of consolidation will be submitted for approval by two-thirds of all the outstanding stock of MoPac (R. 34-35, 91). Only §351.425,* of Chapter 351 prescribes a two-thirds vote (absent a different charter provision, §351.270). Respondents are thus committed to the position, approved by both courts below, that Chapter 351, not Chapter 388, is the "applicable State law".

* The text of §351.425 is set out in our Main Brief, Appendix A, 3a-4a.

We proceed to show that Chapter 388 is, indeed, inapplicable and that the proposed consolidation is governed by the voting requirements of Chapter 351.

3. Chapter 388 of the Missouri Statutes is Inapplicable.

In the face of the holding of the Court of Appeals that Chapter 388, despite its broad titular application to railroad corporations, is "confined to special situations of a kind different from the proposed plan here" (R. 153) respondents argue that there were "dozens and perhaps a hundred or more" consolidations of Missouri and foreign railroad corporations (Miss. Br. 65). The dubious data proffered in support of this statement contains nothing at all to support the further point that respondents ask this Court to accept and that is that these consolidations were somehow beyond the special situations permitted by Chapter 388 and thus provide some precedent, drawn from practice, for giving Chapter 388 broader application than its language permits (Miss. Br. 70-71). The contrary appears to be the fact since, as a reading of the cited cases will show, of the five specific cases cited by Mississippi at p. 68, n. 30 of its brief, *every single one* involved a merger or consolidation conforming to the specifications of §§388.290 and 388.300. (See also R. 152)

We turn to the specific language of Chapter 388.

Respondents rely on §§388.290, 388.300 and 388.340* as providing a simple majority stockholders' vote for the proposed consolidation.

a. §388.290 is inapplicable.

§388.290** provides in its paragraph "1" that any two or more railroad companies "in this state" may "con-

* The texts of §§388.290 and 388.300 are set out in the Appendix to MoPac Br. 14a-18a; the text of §388.340 in Miss. Br. 58-59.

** Appendix to MoPac Br. 14a-16a.

solidate in the whole or in the main, and form one company." The section is inapplicable to the proposed consolidation, since it authorizes only the consolidation of railroad companies "in this state." Neither T&P nor T&M is organized in Missouri; neither owns any railroad line in Missouri. The Court of Appeals was thus amply justified in ruling out §388.290 (R. 151).

b. §388.300 *is inapplicable.*

The transactions authorized by §388.300* are listed in the four clauses of paragraph "1" of the section.** Only the second clause authorizes consolidation. It reads:

> "[A]ny such railroad company [heretofore incorporated or hereafter organized in pursuance of law] which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may build, buy, lease *or consolidate,* in the manner provided in section 388.290, with any railroad in such adjoining state, and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; . . ." (Emphasis added.)

This clause is inapplicable to the proposed consolidation for the reason that this section presupposes a railroad which has built its road to the boundary lines of Missouri; such a railroad "may extend into the adjoining state, and *for that purpose* may . . . consolidate" with any railroads in such adjoining State. Respondents themselves do not contend that MoPac proposes to consolidate with T&P "for the purpose" of extending its road into an adjoining state. MoPac's line connects with T&P at Texarkana, on the border of Arkansas and Texas and not on any boundary line of Missouri.

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* The text is in the Appendix to MoPac Br. 16a-18a.

** The four clauses are set forth separately in Miss. Br. 52-56.

c. §388.340 is inapplicable.

This section* is likewise inapplicable to the proposed consolidation. It permits a domestic Missouri railroad company to "acquire" other domestic or foreign railroad lines, but not to consolidate with them. Respondents' contention that the term "acquire" includes "consolidate" is rebutted by *Burge* v. *St. Louis, M. & S. E. R. Co.*, 100 Mo. App. 460; 74 S.W. 7 (1903), which clearly distinguishes between the two concepts:

> "There are two methods recognized by the statutes of Missouri by which railroad corporations may become associated or merged. By section 1059 of the Revised Statutes of 1899 [now section 388.290] provision is made for the amalgamation of two or more railroad companies in this state and the formation of one company. Section 1061 [now section 388.340] contemplates the manner adopted by defendant in this case, and expressly legalizes the extension of the line of any railroad company organized under the laws of this state by acquiring by purchase any line of railroad within or without this state, and the acquisition and ownership of the assets and property of the companies so bought. Under the section of consolidation, the absorbing corporation succeeds to all the powers, rights and property of the consolidated companies, and becomes subject to all their obligations and liabilities. Under the section making valid the purchase by one railroad company of the line and property of another railroad company, no responsibility is imposed on the purchasing company for the obligations of its vendor."

d. *Respondents' reliance on other portions of Chapter 388 is misplaced.*

Respondents apparently recognize that those provisions of Chapter 388 which expressly authorize a railroad con-

* The text is in Miss. Br. 58-59.

solidation—i.e., §388.290 and the second clause of §388.300-1.—do not apply to the proposed consolidation. Accordingly, respondents try to warp other provisions of Chapter 388 so as to make them embrace the proposed consolidation. In addition to §388.340, *supra*, respondents have attempted to utilize the third clause of §388.300 which authorizes a domestic or foreign railroad company, on certain conditions, to "lease or purchase" all or part of any railroad located in Missouri. According to respondents, the authority to "purchase" includes the authority to "consolidate". The language of the statute as well as controlling authority show otherwise. The transactions permitted by the immediately preceding second clause of §388.300-1. are "build, buy, lease or consolidate". By contrast, the transactions authorized by the third clause are only "lease or purchase". Plainly, therefore, a consolidation cannot be effected under the third clause. This is confirmed by *Burge* v. *St. Louis, M. & S.E.R. Co., supra* (100 Mo. App. 460, 74 S.W. 7 (1903)), which recognizes the fundamental difference between "purchase" and "consolidate". The two cases cited by respondents'* were not decided under Missouri law; the statutes there involved did not present the juxtaposition of "purchase" and "consolidation" found in §388.300-1.

We submit, therefore, that there is no provision in Chapter 388 that applies to MoPac's proposed consolidation with T&P and T&M.

B. Reply to Arguments that Chapter 351 Is Not Applicable

As already stated, supra pp. 15-16, both courts have held and respondents themselves have recognized that

* Miss. Br. 54-56 relies on *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321 (1963) which involved Section 7 of the Clayton Act; and on *Chicago & E.I.R. Co.* v. *Doyle*, 256 Ill. 514, 100 N.E. 278 (1912) which involved an Illinois statute.

Chapter 351 is the State law applicable to the proposed consolidation.

Section 351.690 is the starting point for application of Chapter 351. Under that section, the provisions of Chapter 351 are made applicable to railroad corporations. There is no room for doubt on this point. Section 351.690 states that "The provisions of this chapter shall be applicable to existing corporations as follows" and in paragraph (3) specifies "railroad corporations" and a large number of other types of companies. The Court of Appeals correctly held that Chapter 351 applied (R. 153, 155). The only limitations are that chapter 351 is to be applied only to the extent that its provisions "supplement" and "are not inconsistent with" the special laws as to railroads and the other named types of companies.

We have already stated the two limited types of railroad consolidations dealt with under Chapter 388, supra pp. 17-18. In view of this limited coverage of Chapter 388, it is appropriate that it be supplemented by Chapter 351 to apply to railroad consolidations not covered by Chapter 388 and the specific language of §351.690 accomplishes that purpose. Further, there can be no inconsistency between the two chapters, at least not where, as here, the consolidation is not covered by Chapter 388. We may assume, as respondents contend, that Chapter 388, with its simple majority vote, is designed to facilitate those railroad consolidations authorized by Chapter 388. But the chapter is not designed to facilitate railroad consolidations outside its scope, such as MoPac's presently proposed consolidation. Since Chapter 388 does not deal with those consolidations, it establishes no voting policy for them, let alone a policy calling for a simple majority vote.

Respondents have not overcome the explicit statutory language of §351.690 with any of their arguments.

Thus, respondents make lengthy arguments that Chapter 351 is inconsistent with other aspects of Missouri State policy and law as to railroad consolidations.* These claimed inconsistencies are, we submit, beside the point. They were correctly put aside by the Court of Appeals (R. 142-46) because here we are concerned with Missouri State laws only insofar as they deal with the required stockholder vote because State law on this subject is recognized under §5(11). All other State law as to interstate railroad consolidations generally has been superseded under §5(2) and §5(11) of the Interstate Commerce Act.

The result is that in determining whether Chapter 351 supplements and is not inconsistent with the special railroad laws, we confine our inquiry only to the one relevant subject of the required stockholder vote.

If the proposed plan fell within the special categories of railroad consolidations recognized under Chapter 388, then the simple majority stockholder vote required for these consolidations would surely be applicable and would not be replaced by Chapter 351.** Since, however, the proposed consolidation does not fall within the categories so recognized, §351.690 makes it explicit that the voting provisions of Chapter 351 are to be applied.

Section 351.690 is an explicit and complete answer to MoPac's argument (MoPac Br. 48-49, 55) that perhaps there is no Missouri law on the subject of stockholder vote and that the Court of Appeals erred in failing to recognize this.

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* See especially Miss. Br. 37-71.

** This stockholder vote would, however, still be the class vote under the charter. §388.020 provides that all railroad corporations within the State shall be subject to all of the provisions of the chapter "not inconsistent with the provisions of their charter." *Daniels* v. *St. Louis, K.C. & N. Ry. Co.*, 62 Mo. 43, 48 (1876) holds that charter provisions will prevail over the majority vote provisions of §388.290 and §388.300.

Respondents advance a further elaborate argument in an attempt to show that §351.690 was not designed to render Chapter 351 applicable to any railroad merger (Miss. Br. 76-81). When Chapter 351 was enacted in 1943, its §§351.410 and 351.415* permitted a domestic corporation to merge or consolidate with a foreign corporation only if both the domestic and the foreign corporation were "formed for a purpose for which a corporation may be formed under this chapter." Since a railroad corporation could not be "formed under this chapter" (see §351.020**), respondents would deduce that the then merger provisions of Chapter 351 could not be applied to the merger or consolidation of a domestic with a foreign railroad. The argument overlooks that §351.690 is explicit in subjecting railroads to those provisions of chapter 351 which otherwise would apply only to corporations "formed under this chapter".

In any event, the merger provisions of Chapter 351 were decisively amended in 1961. The merger or consolidation of a domestic with a foreign corporation is now governed by §351.458.*** The new section completely drops the restrictive clauses of the old; in plain and simple language it provides that "One or more foreign

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* §351.410, as enacted in 1943 (Laws of Missouri 1943, p. 410, §62), and prior to its 1961 amendment, provided:

> "Any two or more domestic corporations formed for a purpose for which a corporation may be formed under this chapter and any domestic corporation or corporations and foreign corporation or corporations formed for a purpose for which a corporation might be formed under this chapter may merge into one of such corporations in the following manner: . . ."

§351.415 (Laws of Missouri 1943, p. 410, §63) made a similar provision for consolidations.

** The text is at Miss. Br. 76.

*** The text is at Miss. Br. 81-82.

corporations and one or more domestic corporations may be merged or consolidated in the following manner, . . ." This change removes any semblance of a pretext for respondents' argument.

An effort is made by MoPac to show that Chapter 388 must be applicable with the argument that Article XI, Section 10 of the Missouri Constitution of 1945* provides that no railroad consolidation shall take place without at least sixty days notice to stockholders. It is then argued that Chapter 388 also requires sixty days notice and is thus consistent with the constitution, whereas Chapter 351 provides for "not less than ten or more than fifty days" notice, §351.230, and is thus inconsistent with the constitution (MoPac Br. 54). We answer that the point has nothing to do with the required vote of the stockholders. If the notice required by §351.230 is inconsistent with the constitution, then that notice section would be inapplicable to railroads under the explicit language of §351.690.

V.

Reply to arguments that Chapter 351 is to be narrowly construed so as not to give effect to charter provisions that require a class vote on a consolidation

Petitioners contend that the vote on a consolidation, fixed at a two-thirds vote of the outstanding shares under §351.425, is to be read in conjunction with §351.270 which gives controlling effect to charter provisions which require a class or series vote and that, as a consequence, the straightforward relationship between these two sections

* See text in Appendix to Miss. Br. 1a.

calls for not only the affirmative vote of two-thirds of all outstanding shares but also a majority vote of each class (our Main Br. 35-36).

MoPac insists that §351.270 must be read restrictively; that it authorizes the charter only to render more stringent the requirements of a class-vote that are already found in Missouri statute law and has no effect on a class-vote required only in a charter; and that consequently §351.270 has no effect on the two-thirds overall vote required under §351.425 (MoPac Br. 57-58).

According to its argument, the provision of §351.270 that the charter will be given effect whenever it requires the vote of holders of "a greater portion of the shares, or of any class or series thereof, than required by this chapter" means that there must be found elsewhere in the "chapter" some specific provision for a class-vote before §351.270 can be given effect to require a class-vote. Since the consolidation section, §351.425 does not prescribe a class vote it follows, MoPac argues, that the class vote prescribed in the charter cannot be given effect under §351.270.

We think that this reading is far too restrictive.

To begin with, §351.055 supports our position that §351.270 empowers a Missouri corporation to provide for class voting rights in its articles. It directs that the articles shall set forth:

> "(3) . . . . the preferences, qualifications, limitations, restrictions, and the special or relative rights . . . in respect of the shares of each class."

Pursuant to this provision, MoPac's articles set forth in Article VII (D) the special or relative rights of each class. Among these are the class voting rights spelled out in paragraph (3) of Article VII (D).

Section 351.055 thus authorizes the creation of classes of shares and any special voting rights thereof, irrespective of any specific statutory provision for class voting rights in particular situations. Sections 351.270 and 351.055 must be read together, and when so read it is apparent that §351.270 intends to sanction class voting provisions incorporated in the articles pursuant to §351.055, to provide a more stringent voting requirement, regardless of whether class voting is otherwise required by any provision of Chapter 351 itself.

The restrictive interpretation urged by respondents would do violence to a most basic concept of statutory interpretation, in that it would render a significant part of §351.270 completely meaningless. *Ex Parte Public Nat'l Bank*, 278 U. S. 101, 104 (1928); *McDonald* v. *Thompson*, 305 U. S. 263, 266 (1938).

Section 351.270 sanctions charter provisions for both class voting and "series" voting. Nowhere does Chapter 351 require a vote by series for any purpose whatsoever. If respondents were correct in their contention that §351.270 permits charters to require series votes only in cases where series votes were already required by statute, then the effect is necessarily to render so much of §351.270 as specifically purports to recognize series voting ineffectual and meaningless.

An equally clear refutation of respondents' position derives from the fact that the only requirements for class voting appearing anywhere in Chapter 351 are found in §351.090,* dealing with amending the charter. Hence, according to respondents, §351.090 provides the only situation to which the class-vote provisions of §351.270 are applicable. MoPac repeatedly contrasts this section with

* The text is in the Appendix hereto.

the merger vote provisions (MoPac Br. 60, 64 n. 9); but MoPac does not point out that in each and every instance where §351.090 requires a class vote, that section itself specifically defers to whatever greater vote of any class may be required by the charter (§351.090-1.(3)(b)b.; -1.(3)(c)b.,d.). Thus, according to respondents' contention, not only is the provision for series voting in §351.270 meaningless, but the provision for class voting therein is also superfluous, since the one section to which respondents contend it applies already contains the same sanction for charter requirements of a greater number of any class than that section requires.

Finally, respondents' proposed construction of §351.270 is also inconsistent with §351.315 of the Missouri Business Corporations Law. Chapter 351 nowhere requires class voting for the election or removal of directors, but simply provides, in §351.315, for removal of directors by the vote of a majority of the stock in the aggregate. Nonetheless, as amended in 1965, that section provides in pertinent part that:

> "Whenever the holders of the shares of any class are entitled to elect one or more directors by the articles of incorporation, the provisions of this section shall apply, in respect of the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole." §351.315-2.

Thus, when the Missouri legislature passed this amendment in 1965, it clearly recognized that §351.055 and §351.270 permit charters to require class voting in any

situation, whether or not class voting is already required by the statute. This implicit interpretation of the class-vote sanctions in Chapter 351 as recently as 1965 is the best indication of the meaning of §351.270 recognized by the Missouri legislature. And it is the only interpretation consistent both with the protective purpose of class-vote legislation and with giving meaningful effect to all the provisions of that section.

Nothing in the legislative history and purpose of Chapter 351 supports respondents' effort to give a restrictive meaning to §351.270. Mississippi in fact has exhaustively treated the legislative history of both the Missouri Railroad and General Corporations Laws, yet in a 50-page analysis on that subject in its brief (pp. 36-86) has been unable to cite a single reference to any legislative intent to limit §351.270 in the narrow fashion that it proposes.

As regards the legislative purpose behind statutory class-voting provisions, MoPac's own cited authority (MoPac Br. 26 n. 6) points out that of course such provisions are intended as a compensating substitute for the common-law protective right of every stockholder not to have his charter rights changed in any way without his consent; i.e., the common law requirement of unanimous consent. Gibson, *How Fixed Are Class Shareholder Rights?*, 23 Law & Contemp. Probs. 283, 292 (1958). Statutes providing for class-voting rights represent a tempered attempt to dilute the pre-statutory right of unanimous consent, while still preserving a meaningful protection for minority interests represented by separate

classes of stock.* This protective purpose would be frustrated if a predominant class were permitted to despoil an otherwise helpless minority.**

* See generally, *e.g.*, Ballantine, Corporations 656 (rev. ed. 1946).

In fact it would appear that the Missouri revisers believed that the right of stockholders of Missouri corporations generally to the protection of a unanimous vote in instances affecting their particular rights continued to remain the law of Missouri until the enactment of Chapter 351 in 1943. See, *e.g.*, §351.090-1.(3)(c) a., which preserves for stockholders of Missouri corporations existing prior to ch. 351, the right not to have their corporations' charters amended so as to adversely affect their rights except by unanimous consent, unless their corporations' charters theretofore permitted such amendments by a lesser vote.

MoPac's argument that class-voting provisions in statutes are essentially concerned only with close corporations simply does not correspond with reality (MoPac Br. 65, 79-80). The following states, *inter alia*, have statutes which make requirements for a class vote controlling when contained in a railroad corporation's charter:

> Arkansas (Ark. Bus. Corp. Act §64-703); Kansas (Kans. Gen. Corp. Code §17-2803); Maryland (Md. Gen. Corp. Law §66); New York (N. Y. Bus. Corp. Law §§616-617); North Carolina (N. C. Bus. Corp. Act §55-108); Texas (Tex. Bus. Corp. Act §5.03); Utah (Utah Bus. Corp. Act §16-10-136); Virginia (Va. Corp. Law §§13.1-12, 13.1-13, 13.1-70).

In addition, the following state statutes require approval of railroad consolidations and mergers solely in terms of class votes, without even any provision for an aggregate vote:

> California (24 Calif. Code Anno. §4107); Michigan (Mich. Pub. Util. Law §22.233, Mich. Gen. Corp. Act §450.52); until Sept. 1, 1964, New York (N.Y.R.R. Law §141).

The following major railroads have charter provisions requiring class votes on mergers and consolidations:

> Chicago & N.W.; Chicago & E. Ill.; Chicago, Milwaukee & St. P.; Kansas City So. Inds., Inc.

These examples demonstrate the invalidity of any assumption that state legislatures are concerned only with close corporations when they enact class-vote provisions.

** See 5 Prentice-Hall, Corporations—Comment accompanying §13.1-70 of Virginia Stock Corp. Law.

Respondents instead attempt to base their case for what the Missouri revisers intended on the forms of class-vote statutes adopted by other states (MoPac Br. 60-64). Thus, they point out that the Illinois statute from which Chapter 351 was derived contained a section (Ill. Rev. Stat. ch. 32, §157.64) specifically requiring a class vote for a merger which was not carried over by the Missouri revisers, and that the language of that section made it interdependent with the Illinois statute's amendment section (MoPac Br. 57-58, Miss. Br. 88-89). Ergo, the failure of the *Missouri* revisers to carry over the section requiring class votes on mergers is supposed to show that §351.270, a completely separate and different section, does not apply to mergers (Miss. Br. 86-89) because of the supposed intent of the *Illinois* legislators some ten years earlier concerning what the latter supposedly intended by the language they used in the Illinois predecessor of §351.270 in relation to other sections of their statute.

But the presumed purpose of the linguistic form of §351.270's predecessor and its presumed interrelationship with ch. 32, §157.64 of the Ill. Rev. Stats. in the minds of the Illinois framers, is clearly no guide at all to the intent of the Missouri revisers ten years later, borrowing passages wholesale from the Illinois statute and rejecting others. The only purpose that is clear in the Missouri revisers' not adopting the Illinois requirement of class voting on mergers in §351.425 is that they did not intend to require it, as a matter of statute law in the absence of a charter provision. Of itself it cannot show, one way or the other, what the Missouri revisers intended by their adoption (not rejection) of §351.270.

Respondents' citations showing that other States have chosen different language casts no light on the language

used in §351.270 (MoPac Br. 60-63). Of even less use are respondents' citations to comments on the Model Act and other States' statutes similar to §351.270, because of those comments' failure to deal one way or the other with the particular question of the effect of such statutes on charter provisions for class voting where none is otherwise required by the statute (MoPac Br. 63).

Nor do respondents resolve anything by pointing to the fact that §351.430 of the Missouri statute (which specifies the manner of executing merger articles) refers simply to verification of "the number of shares" voted for and against the plan, without mentioning additionally the numbers of shares of separate classes, if required (MoPac Br. 64). For the fact is that throughout, the Missouri statute uses such terms as "number," "percentage," and "larger vote" without any reference to a vote of each class, and these refer to situations (charter amendments) where, by the explicit terms of the statute (§351.090) a class vote is undeniably required.*

We submit, instead, that the relevant provisions of Chapter 351 give controlling effect to charter provisions that, as a part of Missouri law, require a class vote on the proposed consolidation. This is the only construction consistent with the sense and purpose of the protective provisions of Chapter 351.

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* See §351.107(2) ("Such amendment, upon adoption by that *percentage* vote of shareholders required. . . ."), and §351.265 ("*Every decision* of a majority of such quorum [of stockholders] shall be valid as a corporate act unless a *larger vote* is required by this chapter"). In both of the latter instances, the general references to "percentage" and "larger vote" comprehend charter amendments, and therefore necessarily refer, *inter alia*, to class-vote requirements (§351.090). The short-hand use of such terminology to refer to all possible kinds of vote requirements is not unusual, as evidenced by the similar use of the term "different vote" in §5(11) of the Interstate Commerce Act. (Emphasis added)

VI.

Reply to conclusions proposed by respondents

Central to the different conclusions proposed by the parties is the question whether the Court of Appeals decided or did not decide the questions of Missouri State law that were submitted to it to give effect to "applicable State law" under §5(11).

Petitioners have taken the position that the Court of Appeals failed to resolve its stated doubts as to State law and reached its decision reversing the decision of the District Court on State law by resort to erroneous applications of federal law (Main Br. 20-22).

Respondents, on the contrary, urge that the Court of Appeals decided all questions of State law adversely to petitioners (MoPac Br. 8-12; Miss. Br. 18-21).

Based on their premise, respondents ask that the judgment of the Court of Appeals be affirmed.

Petitioners, based on their reading of the opinion of the Court of Appeals, have urged reversal due to errors in the application of federal law and have further asked that this Court accept the reasonable and permissible decision of the District Court on questions of State law, a decision on these points not overturned by the Court of Appeals.

All parties agree that the Court of Appeals decided that applicable State law is in Chapter 351, the Missouri General and Business Corporations Law, and not in Chapter 388, the Railroad Corporation Law (R. 153, 157; MoPac Br. 48 and Miss. Br. 36-71 urge error in this holding).

Beyond that one point of State law, we find no more than expressions of doubt and statements by the Court of Appeals that it is not persuaded to reach a given con-

clusion and we find a resolution of the stated doubts only by erroneous applications of federal law (R. 150, 155, 157).

In this circumstance, we have not deemed it appropriate to ask this Court to examine the essential State law questions de novo and have, instead, proposed that this Court reverse the judgment of the Court of Appeals for errors in federal law and accept and affirm the decision of the District Court on the State law questions as a reasonable and permissible decision not overturned by the Court of Appeals (Main Br. 37).

Both respondents complain that this course will deprive them of appellate review by the Court of Appeals on the State law points (MoPac Br. 35; Miss. Br. 22-24). This is not correct. All questions of State law were fully briefed and argued below and the Court of Appeals gave them full consideration (R. 148-9, 152, 154). To be sure, respondents were not able to persuade the Court of Appeals to accept their view of State law. They merely raised doubts. In this situation, the normal procedure of the Court of Appeals would be, as it stated in its opinion, to reach its decision by applying the rule that it would not "override a permissible conclusion reached by an experienced trial judge as to a doubtful question of the law of his state" (R. 158). The reason the Court of Appeals did not apply this rule was because, as it stated, "our difference with the district court relates to this statute [§5(11)] and the national transportation policy" (R. 158). This difference is not, of course, a difference with the decision of the District Court on any State law point.

In this circumstance, we read the opinion of the Court of Appeals to mean that, had it not been for its "difference" on these federal points, it would have accepted the conclusion reached by the District Court on the State law points and affirmed its judgment. The Court of

Appeals, however, did not do this because, as we submit, it committed errors on federal law and reached its decision on these erroneous federal grounds but left untouched the opinion of the District Court on State law points.

Respondents' failure to persuade the Court of Appeals of their State law views does not give them a right to try again. They have had a full review of all State law questions in both courts below. Further, we see no need of any review of these State law points by this Court and we do not ask it. If this Court disagrees with the Court of Appeals on the questions of federal law, the case is ripe for final adjudication by this Court.

If, however, this Court should disagree with our reading of the opinion of the Court of Appeals, then we ask this Court to review the questions of State law as well as the questions of federal law presented and briefed by all parties and, for all of the reasons stated in our main brief and herein, to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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January 12, 1967

APPENDIX

MISSOURI GENERAL AND BUSINESS CORPORATION LAW, R.S. Mo. (1959), 17A Mo. STATS. ANNO., CHAPTER 351 (VERNON'S 1966):

351.090. Amendments, how made.—1. Amendments to the articles of incorporation shall be made in the following manner:

. . . . . .

(3) At such meeting a vote of the shareholders entitled to vote shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote, provided, however:

. . . . . .

(b) If any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving, in addition to the affirmative vote of the majority of all other outstanding shares entitled to vote, the following vote of each other class of shares, voting as a separate class, whether by the terms of the articles of incorporation such class be entitled to vote or not, over which such new or additional preferential shares would have a priority or with which such new or additional preferential shares would participate: a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote, the affirmative vote of at least seventy-five per cent of the outstanding shares of each such class which is subject to such priority or participation; b. In the case of corporations existing prior to the passage of this chapter, or of

corporations organized under this chapter, the articles of incorporation of which do provide for the adoption of such an amendment upon a specified vote of such class of shares, the affirmative vote, but not less than a majority, of each such class, which is subject to said priority or participation, as specified in the articles of incorporation; and c. in case of corporations organized under this law the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote of such class, the affirmative vote of at least a majority of each such class which is subject to said priority or participation;

(c) If any amendment would alter or change the preferences, priorities, special rights or special powers given to any one or more classes of preferential shares by the articles of incorporation so as to affect such class or classes adversely, then the shareholders of each such class of preferential shares so affected by any such amendment shall vote thereon, whether by the terms of the articles of incorporation such class be entitled to vote or not, and the following vote of each such class of preferential shares so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other outstanding shares entitled to vote, namely: a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the unanimous vote of each such class; b. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do provide for any such change or alteration on a specified vote, the affirmative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class; c. In the case of corporations organized under this chapter,

the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the vote of holders of seventy-five per cent of the outstanding shares of each such class; and d. In the case of corporations organized under this chapter, the articles of incorporation of which do provide for any such change or alteration upon a specified vote, the affimative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class. Nothing contained in this paragraph (c) shall be construed to apply to any amendment providing only for the creation or increase of shares of any one or more classes.

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